

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Dan-Ellen, Inc.	: : :	: : :
		AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision of a Determination or a Refund of Corporation Franchise Tax under Article 9A of the Tax Law for the Fiscal Years Ended 2/28/77 & 2/28/78.	: : : :	

State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Dan-Ellen, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dan-Ellen, Inc.  
152 Madison Ave.  
New York, NY 10016

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
10th day of November, 1983.

Martha L. Brunelle

Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Dan-Ellen, Inc. :  
AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Corporation :  
Franchise Tax under Article 9A of the Tax Law for :  
the Fiscal Years Ended 2/28/77 & 2/28/78. :  
:

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State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Philip R. November the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Philip R. November  
November & November  
225 Broadway  
New York, NY 10007

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
10th day of November, 1983.

Maucha L. Drusselle

Connie Hagelund

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

November 10, 1983

Dan-Ellen, Inc.  
152 Madison Ave.  
New York, NY 10016

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Philip R. November  
November & November  
225 Broadway  
New York, NY 10007  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
DAN-ELLEN, INC.	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Franchise Tax on Business Corporations	:	
under Article 9-A of the Tax Law for the Fiscal	:	
Years Ended February 28, 1977 and February 28,	:	
1978.	:	

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Petitioner, Dan-Ellen, Inc., 152 Madison Avenue, New York, New York 10016, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 9-A of the Tax Law for the fiscal years ended February 28, 1977 and February 28, 1978 (File No. 29451).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 4, 1983 at 9:00 A.M., with all briefs to be submitted by March 25, 1983. Petitioner appeared by November and November, Esqs. (Philip R. November, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Irwin Levy, Esq., of counsel).

#### ISSUE

Whether petitioner maintained a regular place of business outside New York, so as to entitle it to allocate its business income within and without this state.

#### FINDINGS OF FACT

1. Petitioner, Dan-Ellen, Inc. ("Dan-Ellen"), timely filed franchise tax reports for the fiscal years ended February 28, 1977 and February 28, 1978,

computing and allocating its business income (which constituted the whole of its entire net income for those years) as follows:

<u>FYE</u>	<u>BUSINESS INCOME</u>	<u>BUSINESS ALLOCATION PERCENTAGE</u>	<u>ALLOCATED BUSINESS INCOME</u>
2/28/77	\$129,279.58	60. %	\$77,567.74
2/28/78	168,131.22	40.75%	68,513.47

2. On February 5, 1980, the Audit Division issued to Dan-Ellen a Notice of Deficiency, asserting additional franchise tax due under Article 9-A of the Tax Law for the fiscal year ended February 28, 1977 in the amount of \$5,171.19, plus interest. On March 13, 1980, the Audit Division issued to petitioner a Notice of Deficiency, asserting additional franchise tax due for the fiscal year ended February 28, 1978 in the amount of \$9,961.77, plus interest. The ground for the asserted deficiencies was the Audit Division's disallowance of petitioner's business allocation, in reliance upon Matter of Dan-Ellen, Inc. (State Tax Comm., December 13, 1978), determination confirmed, Matter of Dan-Ellen, Inc. v. N.Y.S. Tax Comm., 79 A.D.2d 732 (3d Dept.), concerning fiscal years 1970 through 1973.

3. Petitioner is a domestic corporation which sells women's lingerie to retail stores throughout the country. Petitioner's stock is owned by two individuals who, together with one other individual, hold all the shares of Clock Fashions, Inc. ("Clock"), also a New York corporation. Clock is similarly engaged in the sale of women's lingerie, but of a higher quality than that sold by Dan-Ellen. Petitioner and Clock maintain adjoining showrooms at the same address in New York City, where samples are kept and customer orders are placed.

4. During the period under consideration, Dan-Ellen and Clock issued combined financial statements in order to obtain credit sufficient in amount to

purchase materials in the volume they required. All necessary raw materials were purchased by Clock on behalf of both corporations and were paid for by check drawn on Clock's account. Purchase orders were issued on Clock business forms, which generally indicated (among other things) the particular style number of Dan-Ellen or Clock goods into which the raw materials would be manufactured. Raw materials were delivered to Damy Industries, Inc. ("Damy") in Athens, Tennessee, for manufacture into finished lingerie. Upon arrival at Damy, approximately 80 percent of the raw materials were identifiable as belonging to either Dan-Ellen or Clock; the remaining 20 percent could not be so identified. No evidence was presented, however, to demonstrate that petitioner acquired title to some of these identifiable goods; the purchase orders were Clock forms and reflected shipment to and in the name of Damy. Approximately 75 percent of the manufactured goods were shipped directly from Damy to the customers of Dan-Ellen and Clock; 25 percent were shipped to Joint Venture Trucking, a central warehouse located in Jersey City, New Jersey, which coordinated shipments of and transported goods manufactured by diverse firms to the same destinations.

5. Dan-Ellen and Clock entered into the above-described contractual arrangement with Damy in 1974. Dan-Ellen's two shareholders own approximately 45 percent of the outstanding shares of Damy.

6. Damy billed Clock for all manufacturing and shipping services it rendered to Clock and petitioner, and Clock in turn billed petitioner for its share of this charge. As Dan-Ellen collected monies upon its receivables, it remitted funds to Clock; at year's end, an adjustment was made to the Clock-Dan-Ellen intercompany account for any amount still due, as well as a proportionate share of the cost of raw goods and overhead incurred by Clock.

7. Petitioner's two shareholders (who were also officers) travelled to the Tennessee location as needed, approximately 15 to 20 times per year. Damy set aside an office for their use on such occasions.

8. Petitioner received correspondence in its own name at the Tennessee address.

9. All petitioner's books and records were maintained in Tennessee by Damy employees.

10. In the computation of its business allocation for fiscal years 1977 and 1978, petitioner showed the following amounts and percentages of property, receipts and payroll within this state:

(a) fiscal year ended February 28, 1977

	<u>NEW YORK</u>	<u>EVERYWHERE</u>
Average value of other tangible personal property owned	\$ 9,333.32	\$ 18,666.64
Percentage in New York		50%
Receipts from sales of tangible personal property where shipments are to points within New York	\$1,623,127.58	
Receipts from all sales of tangible personal property		\$5,410,425.28
Percentage in New York		30% *
Wages, salaries and other compensation of employees, except general executive officers	\$ 87,285.00	\$ 87,285.00
Percentage in New York		100%

(b) fiscal year ended February 28, 1978

Average value of other tangible personal property owned	\$ 12,070.00	\$ 24,139.69
Percentage in New York		50%

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\* It would appear that in calculating its business allocation percentage for fiscal year ended February 28, 1977 petitioner failed to accord double weight to the receipts factor, as provided for under Tax Law section 210.3(a)(4).

Receipts from sales of tangible personal property where shipments are to points within New York	\$ 415,712.38	
Receipts from all sales of tangible personal property		\$6,395,575.03
Percentage in New York		6.5%
Wages, salaries and other compensation of employees, except general executive officers	\$ 106,385.00	\$ 106,385.00
Percentage in New York		100%

11. Shipments of petitioner's goods to points within Tennessee account for less than two percent of petitioner's total annual sales. Petitioner's accountants do not prepare Tennessee tax returns because the fee therefor would far exceed any tax due.

#### CONCLUSIONS OF LAW

A. That during the fiscal years at issue, Tax Law section 210.3(a)(4) required that any corporation, which did not maintain a regular place of business outside New York, allocate all its business income and capital to this state. The regulations promulgated under said provision defined a regular place of business, in relevant part, as:

"any bona fide office (other than a statutory office), factory, warehouse or other space which is regularly used by the taxpayer in carrying on its business. If, for example, in the regular course of its business, a taxpayer:

"(1) stores property in a public warehouse until it is shipped to its customers, the public warehouse is considered a regular place of business; or

"(2) delivers raw materials or partially finished goods to an independent contractor to be converted, processed, finished or improved and the converted, processed, finished or improved goods remain in the possession of the independent contractor until shipped to customers, the plant of such independent contractor is considered a regular place of business if the taxpayer retains title to the material or goods." 20 NYCRR 4-2.2(b) (repealed April 1, 1981).



B. That the plant of Damy Industries, Inc. in Athens, Tennessee, did not constitute a regular place of business of petitioner outside this state. Under the above-quoted regulation, petitioner did not deliver raw materials to Damy, retaining title to the goods while they were in Damy's possession. Matter of Dan-Ellen, Inc. v. N.Y.S. Tax Comm., supra. The public warehouse of Joint Venture Trucking in Jersey City, New Jersey, on the other hand, did constitute a regular place of business of Dan-Ellen outside New York, entitling it to allocate its business income within and without this state.


C. That the petition of Dan-Ellen, Inc. is hereby granted, and the notices of deficiency issued on February 5, 1980 and March 13, 1980 are cancelled in full.


DATED: Albany, New York

STATE TAX COMMISSION

10 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER